OF THE DEFENDANT IN OBTAINING CONTROLLED SUBSTANCES BY FRAUD OR MISREPRESENTATION.

The *Motion and Order to Produce* was signed by a non-law degreed magistrate judge, Judge William Butts, and Spear. (App. 2-3) Spear then used the *Motion and Order to Produce* to obtain Plaintiff's private prescription records from pharmacies in Ruidoso. (App. 3) When Spear took the *Motion and Order to Produce* to Judge Butts, Spear knew that Plaintiff had not committed any crime. Spear was, however, under the mistaken impression that "drug abuse" constituted a crime. Robinson also stated that he did not believe, at the time he provided the information to Spear, that Plaintiff was involved in any criminal activity. Robinson testified under oath at his deposition:

> Q. Sitting here today, was there any indication that anything that you remember that you would have told to Randy Spear around that time when you spoke to him which would have indicated that Chez Douglas or Rene Haynes was involved in criminal activity?
>
> A. No, Sir.

After the *Motion and Order to Produce* was used to obtain Plaintiff's prescription drug records, criminal charges were filed against Plaintiff. (App. 3) Those charges were ultimately dismissed. (App. 3)

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Plaintiff filed her First Amended Complaint for Violation of Civil Rights and State Laws on September 26, 2003, adding the District Attorneys as parties in the lawsuit. (App. 13-14) All other defendants to the lawsuit settled, leaving Dobbs and Key. (App. 3) The District Attorneys moved for summary judgment on qualified immunity grounds. (App. 14-16) In a Memorandum Opinion and Order, the District Court granted the Respondent's Motion, finding no Fourth Amendment violation (App. 19) and that the prosecutors were entitled to qualified immunity (App. 19) and entered Final Judgment in favor of Respondents. Petitioner appealed the matter to the Tenth Circuit.

The Tenth Circuit found that persons have a right to privacy in their prescription drug records. (App. 1-2; 7-8) However, the Tenth Circuit concluded that Plaintiff had failed to demonstrate that the ADA defendants violated a clearly established constitutional right. (App. 1-2) Thus the Court affirmed the district court. (App. 2, 10) In a concurring opinion, Judge Tymkovich noted:

> We have previously held that persons have a due process right to the non-disclosure of personal medical information, *see Herring v. Keenan*, 218 F.3d 1171, 1175 (10th Cir. 2000); *F.E.R. v. Valdez*, 58 F.3d 1530, 1535 (10th Cir. 1995); *A.L.A. v. West Valley City*, 26 F.3d 989 (10th Cir. 1994); *Lankford v. City of Hobart*, 27 F.3d 477, 479 (10th Cir. 1994), and I believe that a search of a pharmacy for such information would implicate a legitimate expectation of privacy under our traditional Fourth Amendment jurisprudence. *See United States v. Thomas*, 372 F.3d 1173, 1176

> (10th Cir. 2004) (citing *Minnesota v. Carter*, 525 U.S. 83, 87-88, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998)).

(App. 11) Judge Tymkovich went on to explain his concern that:

> Finding a legitimate expectation of privacy under the Fourth Amendment, however, leads to another question: Was the search here reasonable and not in violation of the Fourth Amendment in light of New Mexico's regulation of prescription drug vendors? This is a serious question about which other courts have reached varying conclusions in examining similar statutory schemes. *Compare United States v. Nechy*, 827 F.2d 1161, 1166 (7th Cir. 1987) (upholding search of pharmacy not conducted pursuant to criminal warrant); *United States v. Jamieson-McKames Pharm., Inc.*, 651 F.2d 532, 541-42 (8th Cir. 1981) (upholding warrantless search of pharmaceutical business under closely regulated industry doctrine); *United States ex rel. Terraciano v. Montanye*, 493 F.2d 682 (2d Cir. 1974) (upholding warrantless search of pharmacy for prescription drug records); *Murphy v. State*, 115 Wash.App. 297, 62 P.3d 533 (2003) (upholding warrantless search of customer's drug records); *State v. Russo*, 259 Conn. 436, 790 A.2d 1132 (2002) (same); *State v. Welch*, 160 Vt. 70, 624 A.2d 1105 (1992) (same), *with Murphy v. Townsend*, 187 F.3d 648, 1999 WL 439468 (9th Cir. 1999) (unpublished opinion) (affirming denial of qualified immunity to defendants on summary judgment because factual dispute existed as to whether defendants conducted warrantless search of customer's pharmacy records with intent to engage in criminal investigation); *United States v. Enserro*,

401 F.Supp. 460 (W.D.N.Y. 1975) (warrantless search of pharmacy illegal).

(App. 11-12)

REASONS FOR GRANTING THE WRIT

Based upon a construction of the facts that viewed the facts in a light favorable to the moving party, the district court granted summary judgment to the District Attorneys on the grounds that (1) there was no Fourth Amendment violation, and (2) that the District Attorneys are entitled to qualified immunity. Plaintiff contends that the Tenth Circuit had previously recognized a Fourth Amendment right in a person's confidential medical information, which includes prescription records. *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) (creating a right to privacy in certain personal information); *Herring v. Keenan*, 218 F.3d 1171, 1173 (10th Cir. 2000) ("This circuit, however, has repeatedly interpreted the Supreme Court's decision in *Whalen v. Roe* . . . as creating a right to privacy in the non-disclosure of personal information."); *Lankford v. City of Hobart*, 27 F.3d 477, 479 (10th Cir. 1994) (applying right to privacy in personal information in the context of an employer's search of an employee's medical records); *A.L.A. v. West Valley City*, 26 F.3d 989 (10th Cir. 1994) (applying the right to privacy in personal information in the context of a government official's disclosure of a person's HIV status). Thus, the actions of the district attorney defendants in obtaining the *Motion and Order to Produce*, violating Plaintiff's clearly established Fourth Amendment rights, could not be entitled to qualified immunity.

Whether a warrantless search of pharmacy records, as was conducted by the defendants in the instant case, can be sustained under Fourth Amendment Jurisprudence is a matter of differing opinions in United States Courts. (App. 11-12) This Court should grant the writ to resolve this issue.

I. IT IS CLEARLY ESTABLISHED THAT THE FOURTH AMENDMENT PROHIBITS A LAW ENFORCEMENT OFFICER FROM SEARCHING A PERSON'S PRIVATE PRESCRIPTION RECORDS WITHOUT A WARRANT SUPPORTED BY PROBABLE CAUSE OR REASONABLE SUSPICION.

The threshold issue in this matter is a simple one: Does the Fourth Amendment protect a person's privacy in their prescription drug records? Plaintiff contends that it does and that the District Attorney's actions violated the Fourth Amendment.

"[Section] 1983 allows a plaintiff to seek money damages from government officials who have violated his Fourth Amendment rights." *Wilson v. Layne*, 526 U.S. 603, 609 (1999). However, under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. *Id.* at 818-19.

The Court reviews the grant of qualified immunity on summary judgment *de novo*, *see United States v. Winstar Corp.*, 518 U.S. 839, 116 S.Ct. 2432 (1996) (concerning federal claims court), and views the evidence in the light most favorable to the non-moving party. *See General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512 (1997).

In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence. Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151 (2001). Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). When confronted with a claim of qualified immunity, a court must ask first the following question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Brosseau v. Haugen*, 543 U.S. 194, 125 S.Ct. 596, 598 (2004). To be clearly established, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034 (1987).

If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. *Saucier*, 533 U.S. at 201, 121 S.Ct. at 2156. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established. *Id.* This inquiry,

it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable. *Id.*

Contrary to the holding of the Tenth Circuit Court of Appeals, it was clearly established, at the time of the incident in this matter, that a law enforcement officer could not conduct a warrantless search of her private prescription records and that doing so is a clear violation of the Fourth Amendment. Analysis of this case begins with a simple proposition, that, under Tenth Circuit law extant in 2001, "there [was] no dispute that confidential medical information is entitled to constitutional privacy protection." *A.L.A. v. West Valley City*, 26 F.3d 989, 990 (10th Cir. 1994) (citations omitted). Indeed, the Circuit Court noted the indisputability of the proposition in its opinion in the instant case:

> The scope of personal matters protected by a right to privacy has never been fully defined. Supreme Court decisions "make it clear that the right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Roe v. Wade*, 410 U.S. 113, 152-153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (quotations and citations omitted); *see also, Paul v. Davis*, 424 U.S. 693, 713, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Because privacy regarding matters of health is closely intertwined with the activities afforded protection by the Supreme Court, we have held that "there is a constitutional right to privacy that protects an individual from the disclosure of information concerning a person's health." *Herring*, 218 F.3d at 1173. We have previously applied this

right in the context of an employer's search of an employee's medical records, *Lankford v. City of Hobart*, 27 F.3d 477, 479 (10th Cir. 1994), and in the context of a government official's disclosure of a person's HIV status. *A.L.A. v. West Valley City*, 26 F.3d 989 (10th Cir. 1994).

Although we have not extended the "zone of privacy" to include a person's prescription records, we have no difficulty concluding that protection of a right to privacy in a person's prescription drug records, which contain intimate facts of a personal nature, is sufficiently similar to other areas already protected within the ambit of privacy. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Lankford*, 27 F.3d at 479. Information contained in prescription records not only may reveal other facts about what illnesses a person has, but may reveal information relating to procreation – whether a woman is taking fertility medication for example – as well as information relating to contraception. *See Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); *Stidham v. Peace Officer Stds. & Training*, 265 F.3d 1144, 1155 (10th Cir. 2001) (providing that disclosed information "must be highly personal or intimate" in order to receive constitutional privacy protection); *Doe v. Southeastern Pennsylvania Transportation Authority*, 72 F.3d 1133, 1138 (3rd Cir. 1995) (holding that "[a]n individual using prescription drugs has a right to expect that such information will customarily

> remain private."). Thus, it seems clear that privacy in prescription records falls within a protected "zone of privacy" and is thus protected as a personal right either "fundamental" to or "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937); *Roe*, 410 U.S. at 152, 93 S.Ct. 705.

(App. 6-7; footnote omitted here)

The Tenth Circuit's holding in *Lankford v. City of Hobart*, 27 F.3d 477 (1994), that a police chief was not entitled to qualified immunity with respect to a claimed violation of civil rights for seizure and review of a police dispatcher's medical records, is instructive. As to the claim for wrongfully obtaining the plaintiff's medical records, this Court first noted that there is "no question that an employee's medical records, which may contain facts of a personal nature, are well within the ambit of materials entitled to privacy protection." 27 F.3d at 479 (citations omitted). The Court opined that, should the plaintiff establish the facts as alleged, it "would undoubtedly establish a prima facie case that a clearly established privacy violation occurred." *Id.*

Most cases involving these propositions trace their lineage to *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869 (1977), a case which addressed the constitutionality of a New York state regulatory scheme which required the reporting of prescription information to the New York State Department of Health. Up until the opinion giving rise to the instant petition, the Tenth Circuit had "repeatedly interpreted the Supreme Court's decision in *Whalen* as creating a right to privacy in the non-disclosure of personal information." *Herring v. Keenan*, 218 F.3d 1171,

1175 (10th Cir. 2000); *see, e.g.*, *Slayton v. Willingham*, 726 F.2d 631, 635 (10th Cir. 1984) (holding that the Supreme Court explicitly recognized the constitutional right to privacy in *Whalen*); *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) ("Due process thus implied an assurance of confidentiality with respect to certain forms of personal information possessed by the state").

Instead of allowing these precedential authorities to control, the district court relied on a Supreme Court of Connecticut case, *State v. Russo*, 790 A.2d 1132 (Conn. 2002), which noted that there was a conflict among the circuits regarding whether a warrant is needed to search prescription records. (App. 18-19; *and see* App. 12) Plaintiff contends that there was no conflict in the Tenth Circuit and that *A.L.A. v. West Valley City* clearly established the proposition that there is a constitutional right to privacy in confidential medical information – including prescription records – in 1994, well before the 2001 events that gave rise to this case. However, to the extent that the District Court noted a split among the Court's deciding the issues of privacy and the application of the constitutional right to privacy in this case, a writ of certiorari should issue to resolve the conflict.

The State of New Mexico recognizes a privacy interest in a person's prescription information. The law of New Mexico and the standards of the pharmacy profession recognize a privacy interest in prescription drug records. The New Mexico Board of Pharmacy, in regulations which are part of the New Mexico Administrative Code, defines the following conduct as unprofessional or dishonorable for a pharmacist:

> Failure to hold in the strictest confidence all knowledge concerning patrons, their prescriptions, and other confidence entrusted or acquired of by him [sic]; divulging in the interest of the patron only by proper forms, or where required for proper compliance with legal authorities.

16 New Mexico Administrative Code ("NMAC") 19.4.9(C)(8). The same definition appears in the section entitled "Dishonorable Conduct." 16 NMAC 19.27.7(B)(7). The regulations permit disclosure of prescription information only pursuant to a "court order." 16 NMAC 19.19.6.23(G)(1)(a). That regulation defines as "confidential," any prescription or medical information obtained by a pharmacist. New Mexico's position is consistent with the "Principles of Practice for Pharmaceutical Care" adopted by the American Pharmacists Association, which provide that, "Patient information must be maintained in a confidential manner."

In *Doe v. Southeastern Penn. Transp. Auth.*, 72 F.3d 1133 (3rd Cir. 1995) the Third Circuit concluded that a persons medical prescription records fall within the "ambit of information protected by the Constitution," 72 F.3d at 1137, relying on *Whalen v. Roe, supra.*[1] *See, also, United States v. Sutherland*, 143 F.Supp. 609 (W.D. Va. 2001) (federal courts have acknowledged the importance of protecting patient privacy in medical records). Whether this Court approaches the issue in a general sense, or the specific details of the information sought, Plaintiff contends

[1] The "balancing test" referred to in *Doe* would not apply in this case. The only significance of the *Doe* holding is that prescription records are constitutionally protected, which triggers the warrant requirement in a criminal context.

the right was clearly established in January 2001. This Court has recognized that the Fourth Amendment "protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). *Katz* stands for the proposition that, in order to search a private area, a law enforcement officer must obtain a search warrant based upon probable cause. As Justice Stewart wrote: "this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end." *Id.* at 356-57. Plaintiff had a privacy interest in her confidential prescription records that was clearly established at the time the *Motion and Order to Produce* was issued. Thus, the District Attorneys were required to obtain a search warrant based upon probable cause to search those records.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE DISTRICT ATTORNEY DEFENDANT WAS ENTITLED TO QUALIFIED IMMUNITY.

Having determined that it was clearly established, in January 2001, that a person had a Fourth Amendment right in her or his prescription drug records, this Court must next review the determination that the District Attorneys were entitled to qualified immunity. A reasonable mindful government officer is presumed to be mindful of clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). In this case, the District Attorneys were not entitled to qualified immunity because the *Motion and Order to Produce* that they submitted to obtain Plaintiff's prescription records fails to meet the probably cause requirement for a search warrant and, in

fact, does not even meet a lesser standard of reasonable suspicion.

It is unclear whether the District Court fully ruled on the qualified immunity issue. In the Memorandum Opinion and Order, the only reason given for the finding of qualified immunity is that "the law was not clearly established at the time of the alleged violation." (App. 19). Plaintiff contends that, not only did the District Attorneys violate her clearly established rights, but that their conduct was not objectively reasonable in light of the information they possessed at the time of the violation (which is actually a burden the District Attorneys would bear). *Hollingsworth v. Hill*, 110 F.3d 733, 738 (10th Cir. 1997). In making this argument, Plaintiff points the Court to the volume of evidence which supports these contentions.

First, Spear admitted that the *Motion and Order to Produce* was not a search warrant. Search warrants in New Mexico's magistrate courts are governed by Rule 6-208 New Mexico Rules Annotated, which provides, in pertinent part:

> A. . . . A warrant shall issue only on a sworn written statement of the facts showing probable cause for issuing the warrant.
>
> * * *
>
> F. Probable Cause. As used in this rule, "probable cause" shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request

> for a warrant the court may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such additional evidence shall be reduced to writing, supported by oath or affirmation and served with the warrant.

Thus, it is clear that a search warrant must be based upon probable cause of the commission of the crime. The only information provided to Spear and the District Attorneys prior to his seeking the *Motion and Order to Produce* was that (1) Plaintiff was in Robinson's office seeking pain medication, and (2) that she was seeing another doctor in Roswell, New Mexico. (App. 2) At his deposition under oath, Spear could not articulate what crime was committed and Robinson testified that he did not believe Plaintiff was involved in criminal activity.

In an attempt to justify the issuance of the *Motion and Order to Produce*, the District Attorneys cited to Rule 6-606 NMRA, which allows the issuance of subpoenas for trial. Notwithstanding that the *Motion and Order to Produce* failed to comply with Rule 6-606 in numerous respects, the primary problem is that the form referred to in the rule requires a party to serve a subpoena on the attorney for a party to the action. *See, e.g.*, Form 9-217 NMRA (requiring service on attorney in accordance with the Rules of Criminal Procedure); Form 9-503 NMRA (subpoena only for trial, for hearing or to produce documents at a trial or hearing). Plaintiff is unaware of any statute or rule in New Mexico which allows an "investigative subpoena" based upon any standard other than probable cause.

The District Attorneys argued below that, because a magistrate – Judge Butts, who did not have a law degree – signed the *Motion and Order to Produce*, they are absolved of liability. This Court rejected that position in *Malley v. Briggs*, 475 U.S. 335 (1986). In *Malley*, the police officer argued that he was entitled to rely on the judgment of a judicial officer in finding probable cause. The Supreme Court rejected this view, noting that the issue was whether a "reasonably well-trained officer in petitioner's position would have known this his affidavit failed to establish probable cause and that he should not have applied for the warrant." 475 U.S. at 345. A plain reading of the *Motion and Order to Produce* indicates absolutely no evidence of a crime or possible crime.

The search warrant issues, in the context of New Mexico law, are addressed at length in *Montes v. Gallegos*, 812 F.Supp. 1159 (D.N.M. 1992), in which the district court rejected an affidavit which "simply makes conclusory statements" that a person committed certain crimes. *Id.* at 1163. As in this case, there were no facts enabling the magistrate to determine the veracity of the allegations made.[2] *Id.* at 1163-1164. The district court concluded that the plaintiff in that matter was entitled to summary judgment, based upon the facially invalid search warrant. In this case, the statements made in support of the warrant are barely conclusory. Given that there is no procedural mechanism – other than a search warrant – which would allow the District Attorneys to conduct such a search, and the undisputable fact that no such warrant was obtained, the conduct of the District Attorneys was tantamount to conducting a warrantless search.

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[2] The factual statement contained in the affidavit in *Montes* is actually more detailed than the statement contained in the *Motion and Order to Produce* in the instant case.

Finally, although not argued below, the District Attorneys are not entitled to claim prosecutorial immunity in this matter. In *Kalina v. Fletcher*, 522 U.S. 118 (1997), this Court rejected a claim of absolute immunity for prosecutors in a matter involving attestation to the facts in an arrest warrant. The Court distinguished investigative from prosecutorial functions. In the instant case, the District Attorneys were performing an investigative function by (1) appearing as the moving party in the *Motion and Order to Produce*, (2) having the *Motion and Order to Produce* read to them and changes made, (3) having a standing policy of reviewing all such documents before they are filed with a court.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that this Court grant a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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Dated: November 11, 2005

APPENDIX A

419 F.3d 1097

United States Court of Appeals,
Tenth Circuit.
Chez DOUGLAS, Plaintiff-Appellant,
v.
Pamela DOBBS, Scott Key, and District Attorney's Office for the Twelfth
Judicial District, Defendant-Appellee.

No. 04-2118.

Aug. 16, 2005.

Thomas L. Murphy, Rosenfelt, Buffington & Borg, P.A., Gallup, NM, for Plaintiff-Appellant.

Barbara A. Patterson, Atwood, Malone, Turner & Sabin, P.A., Roswell, NM, for Defendant-Appellee.

Before LUCERO and TYMKOVICH, Circuit Judges, and BLACKBURN,* District Judges.

LUCERO, Circuit Judge.

Chez Douglas brings this 42 U.S.C. § 1983 action alleging that her right to privacy was violated by a police search of her pharmacy prescription records executed pursuant to a court order. The district court granted summary judgment for defendants, finding that Douglas's right to privacy had not been violated, and that defendants were entitled to qualified immunity. On appeal we must decide whether Douglas has a right to privacy in her prescription drug records, and if so, whether that right

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* The Honorable Robert E. Blackburn, United States District Judge for the District of Colorado, sitting by designation.

was violated by the role of the Assistant District Attorney ("ADA") in the search. We conclude that persons have a right to privacy in their prescription drug records. Because we also conclude that Douglas has failed to demonstrate that the ADA violated a clearly established constitutional right, we agree with the district court that the remaining defendant before us is entitled to qualified immunity. Accordingly, we **AFFIRM.**

I

Chez Douglas (a.k.a. Renee Haynes), the plaintiff below, sued, inter alia, the Village of Ruidoso, Sergeant Randy Spear, and ADA Pamela Dobbs and District Attorney ("DA") Scott Key under 42 U.S.C. § 1983 for violating her civil rights when they authorized and conducted a search of her pharmacy prescription records.[1] Sergeant Spear learned from Douglas's physician, Dr. Christopher Robinson, who had prescribed pain medication to Douglas, that he suspected Douglas of abusing prescription medication by forging prescriptions and by running through her prescriptions too quickly. Dr. Robinson also stated that he believed Douglas was obtaining additional prescriptions using a different name – Haynes – to procure those prescriptions from another physician in Roswell. After Dr. Robinson provided Sergeant Spear with contact information for Douglas, Sergeant Spear prepared a "Motion and Order to Produce Prescription Information" for the purpose of acquiring Douglas's prescription records from a

[1] Douglas's First Amended Complaint also asserted claims of excessive force used against her by police officers pursuant to an arrest for driving while intoxicated. The claims related to that incident have settled and form no part of the present appeal.

local pharmacy. Before presenting the motion to a judge for authorization to conduct the search, Sergeant Spear consulted with ADA Dobbs. The complaint alleges that Dobbs "approved the form of the Motion and Order" which was then submitted to a magistrate. A judge granted the motion, and pursuant to that authorization, Sergeant Spear obtained Douglas's prescription records from a local pharmacy. Subsequent to the search, charges against Douglas for fraudulently altering the dosage amount and quantity of pills in a prescription were filed, but were later dismissed. Douglas then initiated this suit.

Douglas argues that ADA Dobbs violated her privacy and Fourth Amendment rights by authorizing Sergeant Spear's submission of the Motion and proposed Order to the magistrate judge for approval to search her prescription records. Before the district court, Douglas also alleged that DA Key violated her rights in his supervisory role. All other defendants to this suit settled and ADA Dobbs and DA Key moved for summary judgment. The district court found that no clearly established Fourth Amendment right had been violated by ADA Dobbs in the search of Douglas's prescription records and that qualified immunity applied. Additionally, the district court found that DA Key could not properly be held liable under Douglas's municipal liability claim.[2] Douglas now appeals the grant of summary judgment against the remaining defendant, ADA Dobbs, arguing that she had a right of privacy in her

[2] Douglas does not contest in her opening brief the district court's finding that she cannot sustain a claim for municipal liability against DA Key, and therefore we do not address this issue on appeal. *United States v. Black*, 369 F.3d 1171, 1176 (10th Cir.2004) ("Failure to raise an issue in the opening appellate brief waives that issue.").

confidential prescription records which Dobbs violated by authorizing the submission of the Motion and proposed Order to the magistrate judge to obtain approval to search Douglas's prescription records.

II

We review the district court's ruling that ADA Dobbs is entitled to qualified immunity de novo. *Farmer v. Perrill,* 288 F.3d 1254, 1259 (10th Cir.2002). Under the doctrine of qualified immunity, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). When a defendant raises a claim of qualified immunity, the burden shifts to the plaintiff to show that the defendant is not entitled to that immunity. *Medina v. Cram,* 252 F.3d 1124, 1128 (10th Cir.2001); *see also, Scott v. Hern,* 216 F.3d 897, 908-09 (10th Cir.2000) (stating that state attorneys receive qualified immunity for actions that are primarily investigative or administrative).

In order to determine whether a government official is entitled to the protection of qualified immunity, a court must ordinarily conduct a two-part inquiry. First, we ask whether the facts alleged, viewed in the light most favorable to the party asserting injury, show the official's conduct violated a constitutional right. *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Second, a court must ask "whether it would be clear to a reasonable officer that his conduct was unlawful in the

situation he confronted." *Saucier,* 533 U.S. at 202, 121 S.Ct. 2151. We have also established a third inquiry that applies when "extraordinary circumstances" prevent officials from knowing that their conduct violates a clearly established constitutional right. *Roska ex rel. Roska v. Peterson,* 328 F.3d 1230, 1251 (10th Cir.2003).

A clearly established right is one whose contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Because knowledge that an action violates a clearly established statutory or constitutional right is required, the "essential inquiry is: would an objectively reasonable official have known that his conduct was unlawful?" *Lawrence v. Reed,* 406 F.3d 1224, 1230 (10th Cir.2005). Warning against rights asserted at too high a level of generality, the Supreme Court has made clear that the relevant inquiry must be undertaken in the specific context of the case. *Brosseau v. Haugen,* ___ U.S. ___, ___, 125 S.Ct. 596, 599, 160 L.Ed.2d 583 (2004). A plaintiff may not simply allege a Fourth Amendment violation in the abstract, but must demonstrate through relevant prior cases that a defendant's actions in a "more particularized sense" constitute a violation of a constitutional right. *Id.* at 599-600. "If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation." *Id.* at 599.

A

With regard to the threshold issue of whether ADA Dobbs' conduct violated a constitutional right, we must

first determine whether Douglas has a constitutional right to privacy in her pharmacy prescription records. Our jurisprudence has made clear that "[t]here is a constitutional right to privacy in preventing disclosure by the government of personal matters." *F.E.R. v. Valdez*, 58 F.3d 1530, 1535 (10th Cir.1995). In so deciding, we have interpreted the Supreme Court's decision in *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), as creating a right to privacy in certain personal information. *See Herring v. Keenan*, 218 F.3d 1171, 1173 (10th Cir.2000) ("This circuit, however, has repeatedly interpreted the Supreme Court's decision in *Whalen v. Roe* . . . as creating a right to privacy in the non-disclosure of personal information."). In *Whalen*, the Court considered whether the State of New York violated plaintiffs' liberty under the Fourteenth Amendment by collecting information about all prescriptions written for scheduled controlled substances. Although the Court held that New York's scheme did not violate a protected privacy interest, the Court noted that its cases protecting privacy have involved at least two related kinds of interests: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen*, 429 U.S. at 599-600, 97 S.Ct. 869. Because Douglas complains that her Fourth Amendment rights were violated by the disclosure of her pharmacy records, we are primarily concerned in the present case with the interest in avoiding disclosure of personal matters.

The scope of personal matters protected by a right to privacy has never been fully defined. Supreme Court decisions "make it clear that the right has some extension-

to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Roe v. Wade,* 410 U.S. 113, 152-153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (quotations and citations omitted); *see also, Paul v. Davis,* 424 U.S. 693, 713, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Because privacy regarding matters of health is closely intertwined with the activities afforded protection by the Supreme Court, we have held that "there is a constitutional right to privacy that protects an individual from the disclosure of information concerning a person's health." *Herring,* 218 F.3d at 1173. We have previously applied this right in the context of an employer's search of an employee's medical records, *Lankford v. City of Hobart,* 27 F.3d 477, 479 (10th Cir.1994), and in the context of a government official's disclosure of a person's HIV status. *A.L.A. v. West Valley City,* 26 F.3d 989 (10th Cir.1994).

Although we have not extended the "zone of privacy" to include a person's prescription records, we have no difficulty concluding that protection of a right to privacy in a person's prescription drug records, which contain intimate facts of a personal nature, is sufficiently similar to other areas already protected within the ambit of privacy. *See, e.g., Griswold v. Connecticut,* 381 U.S. 479, 484, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Lankford,* 27 F.3d at 479. Information contained in prescription records not only may reveal other facts about what illnesses a person has, but may reveal information relating to procreation – whether a woman is taking fertility medication for example – as well as information relating to contraception. *See Eisenstadt v. Baird,* 405 U.S. 438, 453, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to

be free from unwarranted governmental intrusion into matters so fundamentaliy affecting a person as the decision whether to bear or beget a child."); *Stidham v. Peace Officer Stds. & Training,* 265 F.3d 1144, 1155 (10th Cir.2001) (providing that disclosed information "must be highly personal or intimate" in order to receive constitutional privacy protection); *Doe v. Southeastern Pennsylvania Transportation Authority,* 72 F.3d 1133, 1138 (3rd Cir.1995) (holding that "[a]n individual using prescription drugs has a right to expect that such information will customarily remain private."). Thus, it seems clear that privacy in prescription records falls within a protected "zone of privacy" and is thus protected as a personal right either "fundamental" to or "implicit in the concept of ordered liberty."[3] *Palko v. Connecticut,* 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937); *Roe,* 410 U.S. at 152, 93 S.Ct. 705.

B

Having established that Douglas has a constitutional right to privacy in her prescription drug records, we must determine whether ADA Dobbs' conduct violated that right. Douglas argues that her right to privacy in her prescription medication records was violated when ADA

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[3] This right to privacy is not absolute, however, as it is "well settled that the State has broad police powers in regulating the administration of drugs by the health professions." *Whalen,* 429 U.S. at 603, n. 30, 97 S.Ct. 869. Thus, state law can operate to diminish the privacy expectation in prescription drug records, which in this case must be tempered by the fact that New Mexico apparently requires pharmacies to make these records available to law enforcement, presumably in response to a duly authorized court order. *See N.M. Stat. Ann.* § 26-1-16(A, C, D).

Dobbs approved a proposed order Sergeant Spear used, after obtaining authorization from a court, to search Douglas's prescription records. That proposed Motion and Order, Douglas alleges, lacked sufficient indicia of probable cause, and that by approving its submission to a magistrate judge, Dobbs approved a warrantless search of her prescription records. Accordingly, Douglas fashions her claim against ADA Dobbs as a violation of her Fourth Amendment right to be free from an unreasonable search of her prescription records in which she has privacy interest. She asserts this violation against ADA Dobbs, not for the execution of a warrantless search, but for Dobbs' role in instructing Sergeant Spear with regard to the "Motion and Order to Produce Prescription Information" which he then used to obtain judicial authorization to execute the search.

Douglas cites to no statutory or case law to support her claim that the Fourth Amendment is implicated when district attorneys advise law enforcement officers about proposed motions or orders submitted to judges to obtain authorization to conduct searches. Instead, she merely cites to *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) for the general propositions that the Fourth Amendment protects people not places, and that searches of private areas must be made pursuant to warrants supported by probable cause. This citation, however, fails to support an allegation that a district attorney violates a constitutional right by the mere act of authorizing the submission of a Motion and proposed Order to the magistrate judge for the requested issuance of an order approving a search. Whether a warrant is required to conduct an investigatory search of prescription records, in contrast to the regulatory disclosures at issue

in *Whalen*, is an issue that has not been settled, and is an issue we need not decide in the present case.[4] Because Douglas cannot rely merely upon identifying an abstract right to privacy protected by the Fourth Amendment and then allege that Dobbs has violated it, she has failed to carry her burden under the threshold inquiry for qualified immunity. *See Groh v. Ramirez*, 540 U.S. 551, 578, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) (foreclosing a litigant's ability "to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights") (quotation omitted); *Herring*, 218 F.3d at 1176 ("A plaintiff cannot simply identify a clearly established right in the abstract and allege that the defendant has violated it."). Absent a showing that Dobbs' actions in authorizing the submission of the Motion and proposed Order to the magistrate judge violated a clearly established constitutional right, qualified immunity applies and Douglas's suit must fail.

III

Because Douglas has failed to demonstrate that Dobbs violated a clearly established constitutional right, we **AFFIRM.**

TYMKOVICH, J., concurring in the judgment.

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[4] We therefore do not address Douglas's argument that probable cause is required to search prescription records even though N.M. Stat. Ann. § 26-1-16(c) provides that "[i]t is the duty of all pharmacists to keep an accurate record of all disposals, which record shall be open to inspection by any law enforcement officer of this state."

The questions presented by this case are whether the conduct of the assistant district attorney violated a Fourth Amendment right and, if so, whether that right was clearly established at the time of the search in question. We have previously held that persons have a due process right to the non-disclosure of personal medical information, *see Herring v. Keenan*, 218 F.3d 1171, 1175 (10th Cir.2000); *F.E.R. v. Valdez*, 58 F.3d 1530, 1535 (10th Cir.1995); *A.L.A. v. West Valley City*, 26 F.3d 989 (10th Cir.1994); *Lankford v. City of Hobart*, 27 F.3d 477, 479 (10th Cir.1994), and I believe that a search of a pharmacy for such information would implicate a legitimate expectation of privacy under our traditional Fourth Amendment jurisprudence. *See United States v. Thomas*, 372 F.3d 1173, 1176 (10th Cir.2004) (citing *Minnesota v. Carter*, 525 U.S. 83, 87-88, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998)).

Finding a legitimate expectation of privacy under the Fourth Amendment, however, leads to another question: Was the search here reasonable and not in violation of the Fourth Amendment in light of New Mexico's regulation of prescription drug vendors? This is a serious question about which other courts have reached varying conclusions in examining similar statutory schemes. *Compare United States v. Nechy*, 827 F.2d 1161, 1166 (7th Cir.1987) (upholding search of pharmacy not conducted pursuant to criminal warrant); *United States v. Jamieson-McKames Pharm., Inc.*, 651 F.2d 532, 541-42 (8th Cir.1981) (upholding warrantless search of pharmaceutical business under closely regulated industry doctrine); *United States ex rel. Terraciano v. Montanye*, 493 F.2d 682 (2d Cir.1974) (upholding warrantless search of pharmacy for prescription drug records); *Murphy v. State*, 115 Wash.App. 297, 62 P.3d 533 (2003) (upholding warrantless search of

customer's drug records); *State v. Russo*, 259 Conn. 436, 790 A.2d 1132 (2002) (same); *State v. Welch* 160 Vt. 70, 624 A.2d 1105 (1992) (same), *with Murphy v. Townsend*, 187 F.3d 648, 1999 WL 439468 (9th Cir.1999) (unpublished opinion) (affirming denial of qualified immunity to defendants on summary judgment because factual dispute existed as to whether defendants conducted warrantless search of customer's pharmacy records with intent to engage in criminal investigation); *United States v. Enserro*, 401 F.Supp. 460 (W.D.N.Y.1975) (warrantless search of pharmacy illegal).

As the majority correctly concludes, however, we need not definitively answer this question today. The officer who conducted the search is not a party to this appeal. We are only reviewing the conduct of the assistant district attorney who approved a motion that the officer took to the New Mexico magistrate; the magistrate, in turn, issued an order under state law. Assuming for purposes of this case that both the officer and the assistant district attorney violated Douglas's Fourth Amendment rights, I agree that the district court appropriately found the assistant district attorney is entitled to qualified immunity. Douglas has failed to cite to any precedent holding a district attorney liable in similar circumstances under the Fourth Amendment where a court issued an order under state law. Accordingly, I agree we must affirm the district court's grant of summary judgment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

CHEZ DOUGLAS,

Plaintiff,

v. CIV 02-1434 KBM/LAM

CHRIS CONDON, RANDY SPEAR, VILLAGE OF RUIDOSO, RUIDOSO POLICE DEPARTMENT, PAMELA DOBBS, SCOTT KEY, DISTRICT ATTORNEY'S OFFICE FOR THE TWELFTH JUDICIAL DISTRICT,

Defendants.

MEMORANDUM OPINION AND ORDER

During the course of an arrest for driving while intoxicated, Plaintiff was taken to the ground twice and later, her prescription drug records were searched. She asserts that the force used to subdue her was excessive on both occasions, that the search of her records was illegal, and that the officers were not properly supervised. She brings this suit for compensatory and punitive damages under 42 U.S.C. § 1983 and the New Mexico Tort Claims Act, N.M. STAT. ANN. § 41-4-1 *et seq.* (Michie 1996 & Supp. 2002).

Originally, Plaintiff only brought suit against the four "Ruidoso" Defendants – Officers Chris Condon and Randy Spear, and the Village of Ruidoso and its police department. She was permitted to amend, and her First Amended Complaint added the prosecutor defendants

along with a claim against them concerning the search of her prescriptions. *See Docs. 30, 32.* Because the Ruidoso defendants have since settled with Plaintiff, *see Doc. 56,* their motion for summary judgment is moot. *See Doc. 33.*

The matter now before the Court on the Prosecutor Defendants' ("Defendants") motion for summary judgment, *Doc. 50,* and Plaintiff's motion for sanctions seeking relief which, in essence, would result in judgment in her favor, *Doc. 52.* Pursuant to 28 U.S.C. § 636(c) and FED. R. CIV. P. 73(b), the parties have consented to have me serve as the presiding judge and enter final judgment. *See Docs. 2, 10, 47.*

I. Sanctions Are Not Warranted

Plaintiff argues that because the Defendants failed to timely make their initial disclosures under FED. R. CIV. P. 26, they should not be permitted to use any evidence from the sources disclosed or permitted to raise any affirmative defense. Even though the disclosures were technically late, and I do not countenance such failures, I find Plaintiff's argument frivolous for the reasons stated in Defendants' response. *See Doc. 57.* I underscore that, given the procedural posture of this case, there is an utter lack of showing of bad faith or prejudice. Furthermore, there is no assertion that the tardy initial disclosures in any way hampered Plaintiff from preparing her response to the pending summary judgment motion.

II. Summary Judgment Will Issue In Favor Of The Prosecutor Defendants

Summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The Court must "view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence" that would justify sending the case to a jury. *Williams v. Rice*, 983 F.2d 177, 179 (10th Cir. 1993) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986)). Indeed, summary judgment

> is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

Having carefully reviewed the parties' submissions and relevant authorities, I am satisfied that summary judgment should enter in favor of Defendants for the reasons stated in their briefs and incorporate those arguments and authorities herein by reference. *See Docs. 51, 60.* To that, I add a few observations.

Plaintiff seeks to hold the prosecutors liable for the "order to produce prescription information." The order was issued by a judge upon the officer's sworn statement that Plaintiff's doctor in Ruidoso contacted the officer on

January 18, 2001. At that time, the physician, Dr. Robinson, "advis[ed] that [Plaintiff] has been in his office several times seeking pain medication, and that [she] is also seeing a doctor in Roswell."[1] *Doc. 51*, Exh. 4. The officer further stated that "reasonable suspicion exists for the issuance of this motion and order to produce prescription information in order to prove or disprove any involvement of [Ms. Douglas] in obtaining controlled substances by fraud or misrepresentation." *Id.*

I recognize that the supporting depositions from the doctor and officer contradict the implication that the doctor sought out the officer. To the contrary, it appears that the officer initiated the contact with the doctor. *See, e.g., Doc. 51*, Exh. 1 at 5-7. Dr. Robinson testified in his deposition that Officer Spear, while investigating another of his patients, asked Dr. Robinson "if I had any concerns about patients that might have forged one of my prescriptions." *Id.* at 5. In response, Dr. Robinson gave the officer Plaintiff's name "and maybe an address or telephone number. . . ." *Id.* at 6.

Thus, prior to this contact the doctor had become suspicious that Ms. Douglas was abusing narcotics. Dr. Robinson knew that Plaintiff had been going through prescriptions quickly and had sought prescription medications from other doctors that she had not revealed to him. The doctor documented those observations in the medical records, and these concerns were later related to the officer. *See id.* at 14-17, 18-21. With this information at hand, the officer then drafted the motion and order, submitted it to a prosecutor for review, and upon approval,

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[1] [sic]

took the motion to the judge. *See Doc. 58*, Exh. A at 6-9, 22-24, 37-40.

The fact that the first doctor interviewed did not specifically use the legal terms "fraud" and "misrepresentation" is also immaterial. It is plain that the doctor suspected Plaintiff of substance abuse and engaging in drug seeking behavior to gain access to more than what any individual doctor had prescribed.

Undoubtedly, the affidavit in support of the order could have been more precise. Nevertheless, the officer was apparently aware that Plaintiff was using two different names when he spoke to the first doctor. The use of an alias, coupled with the first doctor's suspicion of substance abuse and drug seeking behavior, provided ample reasonable suspicion and/or probable cause to support the assertion of suspected prescription fraud or misrepresentation.

It is true that the Supreme Court has acknowledged one's "expectation of privacy" in medical information and records, including those related to prescriptions. *Whalen v. Roe*, 429 U.S. 589 (1977). Courts are divided, however, on whether that expectation falls within the zone of privacy protected by the constitution.[2] At least one court has

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[2] A relatively recent law review article discussed the conflict among the circuits.

> In 1995, the Third Circuit . . . conclude[d] that records of prescription medications are private. "An individual using prescription drugs has a right to expect that such information will customarily remain private." . . . Although the Third Circuit adopted Justice Stevens' argument, the Sixth Circuit did not follow suit. . . . [and] concluded that, "[d]isclosure of plaintiff's medical records does not rise to the level of a breach of a right recognized as 'fundamental' under the Constitution." In Ferguson v. City of Charleston, the Fourth Circuit expressly noted the division among the
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> (Continued on following page)

concluded that neither a warrant based upon probable cause nor a court order based upon even reasonable suspicion is needed if a pharmacist turns over prescription records of a customer to a law enforcement officer. *See State v. Russo*, 259 Conn. 436, 790 A.2d 1132 (2002). Moreover, the *Russo* court examined a Connecticut state statute, similar to one in New Mexico,[3] that requires prescription records to be open for inspection by law

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circuits, as follows: Although the Supreme Court addressed a claim to a right of privacy in medical records in Whalen, it declined to decide whether such information merits constitutional privacy protection. See Whalen, 429 U.S. at 605-06. And, the circuit courts of appeals are divided on this issue. Although the United States Supreme Court reversed and remanded the Fourth Circuit's decision in Ferguson, the Court did not address the division of authority noted among the circuits. Instead, it acknowledged an "expectation of privacy" in medical records, as follows, "[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent." The Court did not indicate whether this expectation of privacy was protected by the Constitution, as had been "argued" by Stevens in Whalen.

Joel Glover & Erin Toll, *The Right to Privacy of Medical Records: Balancing Competing Expectations*, 79 Denv. U. L. Rev. 540, 543 (2002) (citations omitted).

[3] N.M. STAT. ANN. §26-1-16(C) ("It is the duty of all pharmacists to keep an accurate record of all disposals, which record shall be open to inspection by any law enforcement officer of this state."). Moreover, the state statutes apparently recognize one's expectation of privacy in the disclosure of such information and balanced it against the state's valid interest in the regulation of controlled substances in N.M. STAT. ANN. § 26-1-16(D) which provides as follows:

> No enforcement officer having knowledge by virtue of his office of any prescription, order or record shall divulge such knowledge except in connection with a prosecution or proceeding in court or before a licensing or registration board or officer, to which prosecution or proceeding the person to which such prescriptions, orders or records relate is a party.

enforcement officials authorized to investigate and enforce controlled substance laws. The *Russo* court

> conclude[d] that § 21a-265 authorizes law enforcement officials to obtain records of prescriptions for controlled substances from a pharmacist without a warrant, subject, of course, to consideration of the pharmacist's constitutional rights. Although, arguably, as a matter of public policy, the law enforcement officials ***should*** be required to obtain prior court approval or the prior consent of the person whose prescription records are sought before gaining access to those records, it is not this court's prerogative to adopt such a policy in the face of an unequivocal legislative mandate to the contrary.

Id. at 457. Here, the officer and prosecutors took the step of obtaining judicial approval before viewing the records and should be commended for that action.

Thus, I find no Fourth Amendment violation. Even if there were a violation, however, the individual prosecutors are entitled to qualified immunity as the law was not clearly established at the time of the alleged violation. Consequently, assuming Plaintiff ***had*** properly raised a municipal liability claim against the District Attorney's Office, the municipality cannot be held liable absent a constitutional violation.

Wherefore,

IT IS HEREBY ORDERED AS FOLLOWS:

1. The motion for summary judgment by the settling defendants *(Doc. 33)* is DENIED AS MOOT;

2. Plaintiff's motion for sanctions *(Doc. 52)* is DENIED;

3. Defendant Dobbs' and Key's motion for summary judgment *(Doc. 50)* is GRANTED; and

4. A final order granting final judgment issue concurrently herewith.

/s/ Karen B. Molzen
UNITED STATES MAGISTRATE JUDGE
Presiding by consent.

2

No. 05-613

In The

Supreme Court of the United States

CHEZ DOUGLAS,

Petitioner,

v.

PAMELA DOBBS, SCOTT KEY and DISTRICT ATTORNEY'S OFFICE FOR THE TWELFTH JUDICIAL DISTRICT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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INTRODUCTION

Defendant/Respondent Pamela Dobbs submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Plaintiff/Petitioner Chez Douglas.

Petitioner asserts that the Court should review the decision in this matter because the District Court for the District of New Mexico and the United States Court of Appeals for the Tenth Circuit were incorrect when they held that Dobbs was entitled to qualified immunity because Plaintiff failed to show that the Dobbs's actions violated her constitutional rights.

STATEMENT

Randy Spears, a police officer for the Ruidoso, New Mexico Police Department, received information from Plaintiff's physician that she was seeking narcotic pain medication from more than one physician using more than one name. The physician also informed Spears that he suspected Plaintiff was taking pain medications more often than prescribed and that she might be forging prescriptions. Obtaining narcotic pain medication through misrepresentation is illegal in the State of New Mexico. NMSA 1978 § 30-31-25 (1972).

Spears drafted a "Motion and Order to Produce Prescription Information" in order to obtain access to Plaintiff's prescription records kept by the local pharmacies. Dobbs was employed as an Assistant District Attorney for the Twelfth Judicial District of New Mexico, which includes the Ruidoso, New Mexico area. Spears presented the "Motion and Order to Produce Prescription Information" to Dobbs for her review.

Spears then submitted the Motion and Order to a New Mexico Magistrate Judge, who approved the Order to Produce Prescription Information. Spears provided the approved Order to pharmacies in the area and obtained Plaintiff's prescription records. Based on these records, Plaintiff was charged with fraudulently altering the dosage amount and quantity of pills of her prescription. The charges were subsequently dismissed.

Plaintiff filed suit against Spears, the Ruidoso Police Department, Dobbs, District Attorney Scot Key, and the District Attorney's Office for the Twelfth Judicial District. Plaintiff did not complete service of process on the District Attorney's Office. Dobbs and Key moved for and were granted Summary Judgment by the United States District Court for the District of New Mexico, dismissing all Plaintiff's claims. Plaintiff did not appeal Key's dismissal. The Tenth Circuit Court of Appeals affirmed Dobbs's dismissal.

REASONS FOR DENYING THE WRIT

I. The Tenth Circuit Correctly Held that Plaintiff Failed to Demonstrate that Dobbs Was Not Entitled to Qualified Immunity

The Tenth Circuit Court of Appeals correctly concluded that Dobbs was entitled to qualified immunity. A two step test is used to analyze the issue of qualified immunity. The first inquiry is whether the facts show the conduct at issue violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001). The next inquiry focuses on whether the constitutional right was clearly established at the time. *Id.*

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 121 S.Ct. at 2156. It is not enough to merely identify a constitutional right in the abstract and contend that it has been violated. *Anderson v. Creighton*, 483 U.S. 635, 639-40, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).

Plaintiff contends that it was clearly established, at the time, that a warrantless search of prescription pharmaceutical records by a law enforcement officer was a violation of her constitutional rights. Dobbs, however, was not a law enforcement officer and did not execute the search. Her participation was limited to reviewing a proposed Motion and Order. Spears submitted the Motion and Order to the New Mexico Magistrate Judge, and obtained prescription information from the local pharmacies.

Plaintiff mischaracterizes the record by contending that Dobbs drafted the Motion and Order with Spears (Pl. Pet. for Writ of Cert. at 3), that Dobbs made changes to the Motion and Order (Pl. Pet. for Writ of Cert. at 19), that the Motion and Order to Produce contained the affidavit of Dobbs (Pl. Pet. for Writ of Cert. at 3), and that Dobbs caused the issuance of the Motion and Order to Produce. (Pl. Pet. for Writ of Cert. at 17). Dobbs's only involvement was review of the documents prior to their submission to the Magistrate Judge. The documents were drafted and submitted by Spears to the Magistrate Judge.

The authority relied upon by Plaintiff arises out of the context of a police officer's qualified immunity for particular actions. *See Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (FBI agents conducting a

warrantless search by electronic surveillance of a public telephone booth); *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (state police officer requesting issuance of an arrest warrant); *Hollingsworth v. Hill*, 110 F.3d 733 (10th Cir. 1997) (police officers serving a protective order and removing children); *Montes v. Gallegos*, 812 F. Supp. 1159 (D. N.M. 1992) (police chief requesting a warrant). Plaintiff has the burden of demonstrating that Dobbs's conduct violated a constitutional right based upon the specific context of the case and upon the actions of the defendant in a "more particularized sense." *Brosseau v. Haugen*, 543 U.S. 194, 125 S.Ct. 596, 599-600, 160 L.Ed.2d 583 (2004). Dobbs was not a police officer. Plaintiff has not demonstrated that Dobbs's review of the Motion and Order violated Plaintiff's constitutional rights.

II. The Constitutional Right to Privacy in Prescription Pharmaceutical Records Was Not Clearly Established at the Time

The Tenth Circuit Court of Appeals held that Plaintiff had a constitutional right to privacy in her prescription drug records. The Tenth Circuit did not have to reach the question of whether such a right was clearly established at the time, because it concluded that Dobbs had not violated a constitutional right.

The scope of the right to privacy under the Constitution is not precisely defined. *See Roe v. Wade*, 410 U.S. 113, 152-153, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). In *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), the Court reviewed the issue of disclosure of prescription information. The State of New York adopted a regulatory scheme requiring disclosure to a centralized data collection agency of certain prescription drugs information,

including identification of the patient taking the medication. The disclosure of the prescription information was held not to violate any constitutional privacy interest. *Id.* at 606, 97 S.Ct. at 879-80. In reviewing the issue of whether the disclosure of such information violated an alleged constitutional right to privacy, the Court noted such regulatory schemes "aid in the detection or investigation of specific instances of apparent abuse." *Id.* at 598, 97 S.Ct. at 876. New Mexico similarly requires a pharmacy's records relating to dangerous drugs be open to inspection by law enforcement officers. NMSA 1978 § 26-1-16(A) (1967). Plaintiff has not identified legal authority from which a reasonable officer could conclude that New Mexico's regulation violated a constitutional right to privacy.

Prior to this case, only one federal appellate court had reviewed the issue of whether the right to privacy encompasses prescription drug information. *Doe v. Southeastern Pennsylvania Transp. Auth.*, 72 F.3d 1133, 1138 (3d Cir. 1995). The remaining authority relied upon by Plaintiff relates to the issue of privacy in the context of medical records or medical condition information. *See Lankford v. City of Hobart*, 27 F.3d 477 (10th Cir. 1994) (medical records); *A.L.A. v. West Valley City*, 26 F.3d 989 (10th Cir. 1994) (HIV status); *Herring v. Keenan*, 218 F.3d 1171 (10th Cir. 2000) (HIV status).

III. New Mexico Law Recognizes that Documents Can Be Obtained Through a Variety of Mechanisms

Plaintiff contends that her prescription records could be reviewed only upon issuance of a document which bore the label of "search warrant." New Mexico permits the disclosure of documents through a variety of mechanisms.

The regulations governing licensed pharmacies in New Mexico provide that prescription information can also be released pursuant to an order issued by a court. N.M. Admin. Code 16.19.6.23(G)(1)(a). Documents can be obtained through issuance of a subpoena. *See generally* Rule 1-045, NMRA 2005. It is undisputed that the Magistrate Judge approved an Order for the disclosure of Plaintiff's prescription records.

CONCLUSION

For the foregoing reasons, Defendant/Respondent Pamela Dobbs respectfully requests that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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